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Antipersonnel Mines, Booby Traps and Improvised Explosive Devices as War Crimes

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Executive Summary

Anti-personnel mines, booby-traps and improvised explosive devices continue to kill and maim civilians on a daily basis, representing an affront to the basic principles of distinction and avoiding unnecessary suffering in international humanitarian law. Despite twenty years on from the Second Amended Protocol to the Convention on Certain Conventional Weapons and the Ottawa Convention on the Prohibition of Anti-Personnel Mines, there have been more than 100,000 casualties of mines or explosive remnants of war (ERW) between 1999-2015.¹ In the Ukraine between May-August 2016 13 civilians were killed (including three children) and 41 injured (7 children) by mines, ERW and booby traps.² In Syria and Iraq, ordinary everyday objects have been rigged with explosive to indiscriminately and perfidiously kill and injure. Yet, there remains legal uncertainty of whether employing anti-such weaponry amounts to war crimes.

In August 2017 Belgium proposed amendment to the Rome Statute of the International Criminal Court to include *inter alia* anti-personnel mines as war crimes.³ This report based on research on international law, state practice and jurisprudence outlines the status and legality of anti-personnel mines and booby-traps on the extent to which they can be considered war crimes. Drawing from this research we also propose draft provisions of what such war crimes would look like under the Rome Statute.

This report outlines the current convention and customary law on the use and prohibition of anti-personnel mines and booby-traps. The report is split into two parts. The first part examines the legality of anti-personnel mines, their position under conventional and customary law, in particular international humanitarian law. The second part explores the legality of booby-traps and other improvised explosive devices. Although Belgium has not proposed an amendment to the Rome Statute to include these types of weaponry, we have included booby-traps and other improvised explosive devices for consideration as a war crime as some 14,301 civilians in 2016 were killed or seriously injured by such weapons.⁴

¹ Landmine Monitor 2016, International Campaign to Ban Anti-personnel Mines – Cluster Munitions Coalition (ICBL-CMC), (2016), p44. Over this 17 year period 102,970 mine/ERW casualties were recorded, including 26,230 people killed, 72,739 injured.

² Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the human rights situation in Ukraine 16 May to 15 August 2016, para.41. In May-August 2017 16 civilians were killed and 42 injured in Ukraine – OHCHR, Report on the human rights situation in Ukraine, 16 May to 15 August 2017, p7.

³ Belgium Proposal of Amendments to the Rome Statute of the International Criminal Court, C.N.480.2017.TREATIES-XVIII.10, 15 August 2017.

⁴ See Explosive Truths: Monitoring explosive violence in 2016, Action on Armed Violence, April 2017, p23.

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This report was compiled by the Human Rights Centre in the School of Law at Queen's University Belfast.⁵

⁵ Cover photograph by Albert Gonzalez Farran, UNAMID, 'Aftermath of fighting in North Darfur', 25 March 2014 from Flickr: <https://www.flickr.com/photos/unamid-photo/13483320053/in/photostream/>

Status and Legality of Anti-personnel Mines

I. Amendment to the Rome Statute for prohibition of anti-personnel mine use as a war crime

The Rome Statute provides a list of war crimes, including grave breaches, other serious violations of international humanitarian law and serious violations of article 3 common to the Geneva Conventions. This list of war crimes was based on two considerations:

- i) The potential crime (“the norm”) should be a part of customary international law; and
- ii) Violations of the norm would give rise to individual criminal responsibility under customary international law.¹

Individual criminal responsibility can likely be attached to anti-personnel mine use, meeting this aspect of the test. Whether anti-personnel mines prohibition is a customary rule of international law will likely determine whether an anti-personnel mine prohibition can be added to the Rome Statute.

II. The prohibition of anti-personnel mines under Customary International Law

A norm in customary international law requires both consistent and general practice, and state *opinio juris*.² The International Committee of the Red Cross (ICRC) catalogues evidence of customary international law in an online database (the database). In terms of consistent and general practice, most states prohibit anti-personnel mines use by citing their obligations under the Ottawa Convention (the Convention). The Convention states the following in Article 1:

1. Each State Party undertakes never under any circumstances:
 - (a) To use anti-personnel mines;
 - (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;

¹ Knut Dörmann, War Crimes under the Rome Statute of the International Criminal Court, *Max Planck Yearbook of United Nations Law*, Volume 7, 2003, Brill (2004), 341–407, p343–345.

² *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion), 1996 International Court of Justice Reports 226 (hereafter *Nuclear Advisory Opinion*) 254, para.64.

- (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.³

The Convention, entered into force in 1999, has been ratified or acceded to by 162 states.⁴ The large proportion of participating states provides evidence that the anti-personnel mines prohibition is consistent and general practice. However such consistent and general practice among states is incomplete. While total adherence to a norm is not required to prove consistent and general practice, a greater proportion of states adhering to the norm offers stronger evidence that the practice is a rule of customary international law.⁵ Several countries have not ratified the Convention, notably, Israel, Russia, China, Korea, Ukraine, India, Pakistan and the United States of America.⁶ Still other states express their desire to choose anti-personnel mines as means of war.⁷

The United States of America offers further evidence of a lack of consistent state practice. While the Obama administration stated the United States would abide by the Convention, it has not ratified it, and continues to maintain anti-personnel mines in the Korean Peninsula.⁸ Although a number of states do not adhere to the anti-personnel mines prohibition, a convention can provide evidence of customary international law even if it is not unanimously adhered to, as full consensus of practice is not required for

³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (opened for signature 3 December 1997, entered into force 1 March 1999).

⁴ Sara Schmitt, 'The Ottawa Convention: Signatories and States-Parties' *Arms Control Association*, 17 August 2017 <<https://www.armscontrol.org/factsheets/ottawasigs>> accessed 1 October 2017.

⁵ North Sea Continental Shelf Cases (*Germany v Denmark*) (Judgement) [1996] ICJ Rep 3, para.74.

⁶ Schmitt, n.4.

⁷ Cuba, Statement by the representative of Cuba before the First Committee of the UN General Assembly during the thematic debate on conventional weapons, 19 October 2010, p2, (State Practice, Chapter 29, VI. Other National Practice), ICRC, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter29_rule81 (2017-10-21).

⁸ The United States however has shifted its policy since 2004 to eliminate persistent (dumb) anti-personnel mines and since 2010 not to employ such mines. See US Law of Armed Conflict Deskbook, International and Operational Law Department, The Judge Advocate General's Legal Center and School (2012), p156.

custom.⁹ While consistent and general practice does not require all states to practice, non-participation from larger states, such as the United States, China, and India, militates against the acceptance of widespread practice.¹⁰ The fact that three of five United Nations Security Council members do not participate in the Ottawa Convention weakens the consistent and general practice.

In terms of *opinio juris* the picture remains mixed. *Opinio juris* as a state's subjective belief to determine whether the state adheres to a norm because it believes that the norm is customary international law;¹¹ this can take the form of national legislation.¹²

There are some examples of states passing legislation prohibiting the use of anti-personnel mines. For example, Uruguay passed legislation in 2006 recognising the prohibition of an anti-personnel mines while referencing both the Convention and a source outside of the Convention as the impetus behind the prohibition. Uruguay refers to its domestic law as 'in compliance with' the Rome Statute of the International Criminal Court, and legislates acts, which it considers 'war crimes'.¹³ The Uruguay legislative prohibition supports that the anti-personnel mines prohibition stems from a source other than Convention obligation. In turn this legislation shows definite evidence of *opinio juris*, similar to provisions in other states.¹⁴

Yet the *opinio juris* suggests that states refrain from using anti-personnel mines because they feel obliged as a matter of conventional law rather than customary

⁹ *North Sea Continental*, para.73.

¹⁰ *Ibid.*

¹¹ *North Sea Continental*, para.77.

¹² C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, (1989) *International and Comparative Law Quarterly*, p857.

¹³ Article 26.3.43, Law on Cooperation with the ICC (2006) – "Using antipersonnel mines understood as any ammunition attached underneath, above or close to the surface of land or a place designed to be exploded by the presence, proximity or contact of a person and which could incapacitate, wound or kill more than one person."

¹⁴ For instance under Senegal's Penal Code (1965), as amended in 2007 under Article 431-5(3) and Sierra Leone in terms of use in relation to children under the Child Rights Act (2007) s.28(2)(b).

international law. Military manuals can provide some insight into *opinio juris*, by containing passages which can clarify a state's view of the law. The ICRC database catalogues references to anti-personnel mines in states' military manuals. The majority of the military manuals referenced on the database declare that anti-personnel mines are prohibited. These manuals reference obligations to the Convention as the source for the prohibition.¹⁵ Only three of the sixteen military manuals on the database identify the indiscriminate nature of anti-personnel mines, or their potential to cause unnecessary suffering, as a reason for prohibition. These military manuals suggest that many states view the anti-personnel mines prohibition as stemming from convention obligations, not customary international law.

The United Kingdom and Australian military manuals offer further evidence against *opinio juris*. The United Kingdom and Australia excuse military members from liability when partaking in joint operations with states which have not ratified or acceded to the Convention.¹⁶ This exception to liability provides evidence against an anti-personnel mines ban as *opinio juris*. A state which allows its military members to participate in joint operations with states which use anti-personnel mines is not likely a state which believes that a ban on use of anti-personnel mines is customary international law, such considerations would cause operational and legal issues for coalition forces under the auspices of NATO or other multinational force.

Almost all of the countries which legislate that possession, transfer, or storage of anti-personnel mines is illegal have ratified the Ottawa Convention.¹⁷ The absence of language in military manuals referencing customary international law suggests that state recognition of a customary norm does not provide the impetus for the ban. While

¹⁵ International Committee of the Red Cross, Practice Relating to the Prohibition of Certain Types of Landmines (*Customary International Humanitarian Law*, 2017) <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_\[8profce](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_[8profce)> accessed 1 October 2017.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

legislation against anti-personnel mines in some countries does offer evidence of *opinio juris*, it is not prevalent and therefore not likely to reflect *opinio juris* among other states. Accordingly *opinio juris* does not likely exist for a prohibition on anti-personnel mines. As such, it is unlikely that the Rome Statute can be amended to prohibit anti-personnel mines *per se*. While the prohibition can attach individual liability, it is not likely that the prohibition is a rule of customary international law. Although a large majority of states have ratified the Ottawa Convention prohibiting anti-personnel mines, there are still notable holdouts, evidencing that the practice is not entirely widespread. Further, state military manuals and legislation suggest that almost all states prohibit anti-personnel mines because of Convention obligations and not because of a belief that these prohibitions are customary international law.

III. Use of anti-personnel mines as violating an already established rule of Customary International Law

While anti-personnel mines use itself may not qualify as a war crime under the Rome Statute, anti-personnel use may qualify as a war crime because it violates existing customary international law on indiscriminate attacks and unnecessary suffering. To clarify, if anti-personnel mines are indiscriminate or cause unnecessary suffering, their use would qualify as a war crime because their effects violated customary rules of international humanitarian law against indiscriminate attacks and unnecessary suffering, identified as war crimes, under Rome Statute provision 8(2)(b)(xx).

A. Indiscriminate attacks

Indiscriminate attacks are prohibited both by an established rule of customary international law and by Additional Protocol I to the Geneva Convention.¹⁸ The ICRC Database recognises indiscriminate attacks as a rule of customary international law because many states adhere to the practice, reflected in state military manuals that

¹⁸ Article 51(4)(b), AP I.

evidence the norm is adhered to because of *opinio juris*.¹⁹ Unlike the rule prohibiting anti-personnel mines, Article 8(2)(b)(xx) of the Rome Statute codifies indiscriminate attacks as war crimes.²⁰

While there is yet to be a listed annex under Article 8(2)(b)(xx) of the Rome Statute, the particular use of anti-personnel mines contrary to conventional obligations and in an indiscriminate way could amount to a war crime. The International Court of Justice stated that it was possible to ban a certain type of weapon because of its indiscriminate nature, as a failing to distinguish between military and civilian targets.²¹ Additional Protocol I sets out:

‘Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- a) those which are not directed at a specific military objective;
- b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.’²²

The nature of anti-personnel mines makes their employment and effect indiscriminate. Anti-personnel mines detonate when a threshold amount of pressure is applied to their surface. No anti-personnel mine can currently differentiate between pressure applied by a lawful combatant and a civilian.²³ Unlike a firearm, which can be aimed at a target, then hit the target with a projectile in milliseconds, an anti-personnel mine’s targeting system does not have such a short temporal relationship between the target and

¹⁹ International Committee of the Red Cross, ‘Practice Relating to Rule 11 Indiscriminate Attacks’ (*Customary International Humanitarian Law*, 2017) < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule11> accessed 1 October 2017.

²⁰ Rome Statute of the International Criminal Court, A/CONF 183/9.

²¹ *Nuclear Advisory Opinion*, p262 at para.92.

²² Article 51(4).

²³ R. McGrath and E. Stover, *Injuries from land mines*, (1991) *British Medical Journal* vol.303, p1492.

impact.²⁴ Anti-personnel mines are unique in terms of weaponry in that it is not possible to adjust the target once the anti-personnel mine is activated. The mine's target is anything that applies the threshold amount of pressure to the space where the anti-personnel has been laid.²⁵ This characteristic of anti-personnel mines makes them indiscriminate, which by their nature cannot distinguish between a civilian or combatant when they are activated. When the anti-personnel mine has been laid, it continues to have the potential to kill long after the armed conflict has ended.²⁶ Although anti-personnel mines can be equipped with self-neutralization or self-destruction mechanisms as a measure of precaution and to decrease the indiscriminate effects of such mines over time, they will still have an indiscriminate effect on civilians as long as they are armed.²⁷

Although anti-personnel mines can be indiscriminate, they can be used in a way in which diminishes their indiscriminateness. Amended Protocol II to the Convention on Certain Conventional Weapons (CCW) sets out requirements that states must adhere to when deploying anti-personnel mines.²⁸ These requirements prohibit anti-personnel mines, which detonate in response to mine detectors or detonate after deactivation.²⁹ The CCW also requires a belligerent party to record the position where mines are laid, to mark the perimeter of the area where the mines were laid, and monitor the area with

²⁴ *Ibid.*

²⁵ M. Grujicic, J.S. Snipes, S. Ramaswami, R. Yavari, C.-F. Yen and B.A. Cheeseman, Analysis of steel-with-composite material substitution in military vehicle hull floors subjected to shallow-buried anti-personnel-detonation loads, (2014) *Multidiscipline Modeling in Materials and Structures* 10(3), p418.

²⁶ See ICRC, *Anti-personnel Landmines – Friend or Foe? A Study of the Military Use and Effectiveness of Anti-Personnel Mines*, 31 December 1996. International Committee of the Red Cross, (hereafter ICRC 'Anti-personnel Landmines') p9.

²⁷ *Ibid.* p56.

²⁸ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), Annexed to the Convention on Certain Conventional Weapons, (opened for signature 3 May 1996, entered into force 3 December 1998) 1996, *Laws of Armed Conflicts* 196, 198 (CCW) Article 3(5)-(6).

²⁹ Articles 4-6, CCW.

military personnel.³⁰ The CCW precautions decrease the chance that a non-combatant will detonate the mines. In this way anti-personnel mines can become less indiscriminate.

B. Unnecessary suffering

Anti-personnel mines use may also violate international humanitarian law by causing unnecessary suffering.³¹ The Fourth Geneva Convention requires countries to enact legislation to punish grave international law breaches including acts that ‘wilfully caus[e] great suffering or serious injury to body’, provided these grave breaches are not justified by military necessity.³² The ICRC database suggests that an attack that causes harm with no military purpose causes unnecessary suffering.³³ As such, it should be prohibited to use certain types of weapons because they cause a harm that is greater than what is unavoidable to achieve legitimate military objectives.³⁴ The ICRC also highlights the potential of causing permanent disability as a factor in assessing unnecessary suffering.³⁵ For example, the ICRC references the prohibition on blinding laser weapons as an example of a weapon which is prohibited because it causes unnecessary suffering, as lasers permanently disables victims by blinding them.³⁶

Injuries associated with anti-personnel mines may cause both disability and death through a combination of infection and the realities of conflict. When an anti-personnel mine explodes, the explosion drives dirt, bacteria, clothing, metal fragments and plastic fragments into the tissue and bone, causing severe secondary infections.³⁷

³⁰ *Ibid.*

³¹ Articles 146-147, Geneva Convention IV relative to the Protection of Civilian Persons in Time of War.

³² Articles 146-147, Geneva Convention IV.

³³ International Committee of the Red Cross, ‘Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering’ (*Customary International Humanitarian Law*, 2017) <https://ihldatabases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70#refFn__25> accessed 1 October 2017.

³⁴ *Nuclear Advisory Opinion*, at 78.

³⁵ ICRC n.26.

³⁶ *Ibid.*

³⁷ Human Rights Watch (HRW) and Physicians for Human Rights, *Landmines: a deadly legacy*, 1993, p21.

The wound contamination impairs surgeons who treat anti-personnel victims, putting the victim's life at risk because the contaminated wound causes infection to spread faster.³⁸ During combat injured combatants must be evacuated at an early stage from the battlefield, requiring surgical care immediately to reduce the chance of permanent damage and death. In many conflicts evacuating injured combatants is delayed, first aid kits are scarce, and close medical facilities are lacking.³⁹ For civilians they are unlikely to have access to such emergency evacuation in times of conflict and so such injuries can prove fatal.

Anti-personnel mines further cause disability due to their design. Anti-personnel mines typically cause bone destruction in the feet or lower limbs, shrapnel fragmentation wounds, blindness, and conductive deafness.⁴⁰ Detonations of anti-personnel mines often require amputation. Although it is difficult to obtain comprehensive statistics on the injuries caused by anti-personnel mines, some studies suggest that from 33-80% of mines blast victims require at least one limb amputation.⁴¹ One author suggests that armies often engineer mines to maim victims rather than kill, because maimed victims cause delays to advancing troops which deceased victims do not.⁴² Hospital stays for anti-personnel mine wounds are often longer than those for gunshot wounds, keeping wounded combatants removed from combat longer.⁴³ Depending on the amount of explosive and fragmentation in an anti-personnel mine it can cause injuries 'far in excess of what is required to put combatants out of action.'⁴⁴

³⁸ *Ibid* p121.

³⁹ *Ibid*. p124.

⁴⁰ John Pearn, Landmines: time for an international ban, *British Medical Journal*, 312(2) April 1996, p991.

⁴¹ Muhammet Can, Humeyra Yildirimcan, Onder Ozkalipci, Mehmet Melek, Yesim Edirne, Umit Bicer, and Huseyin Bulent Uner, "Anti-personnel associated injuries in children in Turkey", [2009] *Journal of Forensic and Legal Medicine* 16, p467.

⁴² Pearn n.40, p991.

⁴³ Can n.41, p467.

⁴⁴ ICRC, Weapons that may cause unnecessary suffering or have indiscriminate effects, 1973, para.179-180 and 247.

Some may argue that military necessity may outweigh unnecessary suffering caused by anti-personnel mines. The fact that anti-personnel mines are likely to cause amputation evidences that they cause unnecessary suffering. However, anti-personnel mines may only incidentally cause amputation, whereas other weapons which have been classified as causing unnecessary suffering, such as lasers, are designed specifically to cause disability. Other forms of fragmentation munitions, which cause amputation through shrapnel, such as grenades, are not classified as causing unnecessary suffering simply because of their potential to amputate limbs. There is some contention that some armies often equip mines with the capacity to disable rather than kill, which could evidence inherently unnecessary suffering that anti-personnel mines can cause.⁴⁵ However, the intention in armed conflict is to put as many enemy combatants out of service, whether through killing or wounding, so causing disablement by itself is not prohibited by weapon use.⁴⁶ Instead it is where such weapons cause superfluous injury and unnecessary suffering, and with anti-personnel mines this may not be so clear-cut so as to allow their prohibition solely on this ground on their general use. That said the intentional use of anti-personnel mines to cause unnecessary suffering to enemy combatants would be prohibited.

Military necessity provides a justification for the suffering anti-personnel mines cause because of their use as defensive weapons which are easy to deploy and cheap. Military necessity recognises that:

‘Permit[ting] a belligerent, subject to any laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.’⁴⁷

Anti-personnel mines may be classed as militarily necessary because of their use as a defensive weapon during armed conflicts. As a defensive weapon, anti-personnel mines

⁴⁵ Pearn n.40, p991.

⁴⁶ See Preamble, St Petersburg Declaration 1868; and UK LOAC Manual, para.6.1.2.

⁴⁷ Hostage case (*US v List et al.*) (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, 1253.

create obstacles, which are designed to delay the enemy and impede enemy forces' formation so that enemy forces can be attacked by other means of war.⁴⁸ By impeding enemy force formation anti-personnel mines help a belligerent party to neutralize enemy forces and thereby gain military advantage. When a belligerent force encounters a minefield its military commander must decide to either allow forces to enter the minefield and accept the casualties, or decide to implement the time consuming process of clearing the minefield.⁴⁹ For example, the United States of America use of anti-personnel mines to continuously guard the border between North and South Korea. Limiting enemy movement with anti-personnel mines is especially useful when the mines are placed around an enemy camp, making it almost impossible for enemy forces under attack to retreat.⁵⁰

Anti-personnel mines can also offer military advantage because they are easy to deploy. Technological advancements allow anti-personnel mines to be delivered in large scale by rocket, artillery and aircraft. Aircraft deployment has made laying anti-personnel mines both safer and efficient because personnel labour from the laying belligerent party is not necessary to create minefields.⁵¹ Lastly, anti-personnel mines provide military advantage because of their low cost. Anti-personnel mines are both cheap, and an effective deterrent available to a belligerent party who wishes to avail themselves of defensive advantage.⁵²

Anti-personnel mines can provide a military advantage by allowing a belligerent party to defend an area continuously, they are easy to lay, and cost-effective. They can also help a belligerent party compel submission because they render areas inaccessible, defend friendly military objectives, and cost little to deploy. According the continued

⁴⁸ ICRC 'Anti-personnel Landmines' n.26, p14–15.

⁴⁹ See HRW n.40, p21.

⁵⁰ ICRC 'Anti-personnel Landmines' n.26, p46; HRW n.37, p22-23.

⁵¹ ICRC 'Anti-personnel Landmines' n.26, p16.

⁵² Shawn Roberts, Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines*, Vietnam Veterans of America Foundation 33.

use of anti-personnel mines by a number of states reflect them being an effective part of a belligerent party's arsenal. However the military advantage of using anti-personnel mines as a defensive strategy may be questioned when used as barrier, denial, tactical or protective minefields will likely produce few enemy casualties as the explosion of one will likely alert both sides, making the attackers find an alternative approach.⁵³ In Syria anti-personnel mines have been used to prevent civilians from escaping towns and cities.⁵⁴

Due to the prohibition on unnecessary suffering, belligerent parties to an armed conflict must consider if alternative weapons are available which cause less injury or suffering and are sufficiently effective in neutralizing enemy personnel.⁵⁵ A study by the ICRC on anti-personnel mines suggests alternatives such as: barbed-wire entanglements, protective fences in combination with sensors, and 'directional fragmentation mine' (munitions with less long-term effects).⁵⁶ Owing to anti-personnel mines capacity to cause unnecessary suffering, and the availability of other effective means to achieve the military advantages which mines provide, it is not likely that the unnecessary suffering caused by mines is outweighed by their military necessity.

On balance, anti-personnel mines are likely prohibited under the Rome Statute provisions which prohibit indiscriminate weapons and unnecessary suffering. While the CCCW requirements do reduce indiscriminateness, anti-personnel mines are still not capable of differentiating between combatants and non-combatants at the standard of a targeted weapon. Further, anti-personnel mines cause unnecessary suffering in their penchant to cause disability, and this suffering is not justified by military necessity

⁵³ ICRC, Weapons that may cause unnecessary suffering or have indiscriminate effects, 1973, para.169.

⁵⁴ Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/36/55, 8 August 2017, p31.

⁵⁵ See Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict*, (3rd ed.), Cambridge University Press (2016), p75–76.

⁵⁶ ICRC 'Anti-personnel Landmines', n.26, p65–68.

considering the other available means to achieve anti-personnel mines' defensive effects without causing such unnecessary suffering.

Our recommendations below follow the confines of Article 8(2)(b)(xx) under international armed conflicts. We do however wish to highlight that non-state armed groups have been more recently prevalent in their use of anti-personnel mines than state actors.⁵⁷ While organisations like Geneva Call have been successful in getting 49 non-state armed groups to sign Deeds of Commitments not to use anti-personnel mines, destroy stockpiles and prosecute those who breach the commitment,⁵⁸ there remains space to consider its place as a war crime under non-international armed conflicts.

IV. Draft of proposed amendment to the Rome Statute

Below we have outlined the possible configuration of anti-personnel mines as a war crime under the Rome Statute. Without an annex as suggested by Article 8(2)(b)(xx), we have instead drafted this provision as an additional sub-article.

Article 8, paragraph 2(b) (xxviii)

(..) 2. For the purpose of this Statute, "war crimes" means:

(..) b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxviii). Employing anti-personnel mines which are primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons and the mine is:

a) designed or of a nature to cause superfluous injury or unnecessary suffering;

⁵⁷ The International Campaign to Ban Landmines – Cluster Munition Coalition (ICBL-CMC) notes that non-state armed groups placed mines in ten countries (Afghanistan, Colombia, Iraq, Libya, Myanmar, Nigeria, Pakistan, Syria, Ukraine, and Yemen) in 2015-2016 compared to three states (Syria, North Korea and Myanmar) - Landmine Monitor 2016 available at <http://www.the-monitor.org/media/2386748/Anti-personnel-Monitor-2016-web.pdf>

⁵⁸ See <https://genevacall.org/what-we-do/landmine-ban/>

- b) used or placed in an indiscriminate way; including:
 - i) not on or being directed against a military objective;
 - ii) employing a method or means of delivery which cannot be directed at a specific military objective; or
 - iii) being expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; or
- c) used or placed without all feasible precautions to protect civilians from the effects of anti-personnel mines;⁵⁹
- d) placed without marking, protecting and recording the mined area;
- e) placed with attached mechanism, such as anti-handling devices, which activates the mine when its tampered with; or
- f) used or placed without self-neutralization mechanism, self-deactivating mechanism or remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves a military purpose.⁶⁰

Elements of the crime

The above hypothetical amendment to the Rome Statute may require proof through the following elements:

⁵⁹ Feasible precautions are those precautions that are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to: the short- and long-term effect of mines upon the local civilian population for the duration of the minefield; the availability and feasibility of using alternatives; and the short- and long-term military requirements for a minefield.

⁶⁰ In light of Amended Protocol II of the CCW Articles 3, 4, 5, 7 and the Technical Annex attached to the Protocol.

- 1) the conduct took place in the context of and was associated with an international armed conflict**

This element was identified as common to all crimes under section 8(2)(b) of the Rome Statute.⁶¹

- 2) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict**

This element was also identified as common to all crimes under section 8(2)(b) of the Rome Statute.⁶²

- 3) The perpetrator used an anti-personnel mine or ordered a person which the perpetrator had de jure or de facto command over to use an anti-personnel mine.**

The conduct element of the crime requires the perpetrator to have some link to the use of an anti-personnel mine.

- 4) That anti-personnel was primarily designed to be exploded by the presence, proximity or contact of a person and incapacitate, injure or kill one or more persons.**

The circumstantial element of the crime requires that the laid anti-personnel was an anti-personnel mine. This element will close liability for this crime to those who believe that they are using or ordering use of anti-personnel mines, but are not in fact using anti-personnel mines. This circumstantial element narrows liability for the proposed amendment.

- 5) The perpetrator:**
 - (a) intended to use a anti-personnel mine;**

⁶¹ Dörmann n.1, p377-378.

⁶² *Ibid.*

The most basic fault element would involve intent to use the anti-personnel mines. The perpetrator must intend to use the anti-personnel. Liability would be fixed on those who intended to use anti-personnel mines, and did in fact use anti-personnel mines.

(b) intended to order a person to use a anti-personnel; or

This mental element would extend liability to military commanders or superiors who order a subordinate, who they had de jure or de facto command over, to use anti-personnel mines.

(c) was reckless or wilfully blind as to whether a person under their orders used anti-personnel mines.

This mental element would extend liability beyond direct intent. It would open liability for military commanders or superiors who should have known that their subordinates were using anti-personnel mines, although these commanders or superiors did not directly order the anti-personnel mine use. Military superiors or commanders who fail to stop their subordinates from setting the mines can have intent imputed to them⁶³.

6) The perpetrator knew or was wilfully blind to the fact that the used anti-personnel mines were primarily designed to be exploded by the presence, proximity or contact of a person and incapacitate, injure or kill one or more persons.

This element requires knowledge or imputed knowledge that the perpetrator knew that anti-personnel mines were used. This element would exclude commanders who did not know or were not wilfully blind to the fact that their subordinates were using anti-personnel mines.

⁶³ Dörmann n.1, p381-382.

The Status and Legality of Booby-Traps and Other Devices

Booby-traps are defined as ‘any device which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.’⁶⁴ Other devices includes ‘manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.’⁶⁵ We have include other devices here given their comparable use as booby-traps in contemporary conflicts, such as in Syria, Afghanistan and Iraq, where improvised explosive devices (IEDs) have been used indiscriminately or perfidiously.

The ICRC Database of Customary International Humanitarian Law details that booby-traps are prohibited if, by their nature or employment, their use violates the legal protection accorded to a protected person or object by another customary rule of international humanitarian law.⁶⁶ The premise supporting these prohibitions of the use of booby-traps, both in purpose and situation, are equally applicable for non-international armed conflict. Colombia’s Constitutional Court has held that the prohibition of certain booby-traps in non-international armed conflict is part of customary international law, which evidently derives from the general rule prohibiting attacks against the civilian population.⁶⁷ Other states have been less forthcoming on the prohibition of booby-traps in their own legal frameworks.

As with anti-personnel mines, there is no customary international law recognised by consistent state practice and *opinio juris* that prohibits booby-traps and other devices outside of the Amended Protocol II of the Convention on Certain Conventional

⁶⁴ Article 2(4) Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW) Amended Protocol II 1996.

⁶⁵ Article 1(5), APII CCW.

⁶⁶ Rule 80 of ICRC Database of Customary International Law.

⁶⁷ Colombia Constitutional Court, *Constitutional Case No. C-225/95*, Judgment, 18th May 1995.

Weapons. Instead the grounds for prohibiting booby-traps and other devices rests under two headings of their indiscriminate and perfidious nature.

I. Booby-traps and other devices as indiscriminate weaponry

Additional Protocol I (1977) of the 1949 Geneva Convention prohibits indiscriminate attacks against civilian populations.⁶⁸ Indiscriminate attacks fall under three headings:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this protocol; and are of a nature to strike military objectives and civilians or civilian objects without distinction.⁶⁹

The ICRC Database recognises this prohibition of indiscriminate attacks as a customary rule of international law established by state practice, which is applicable to both international and non-international armed conflicts. The fundamental principle of distinction is a foundation upon which the prohibition of indiscriminate attacks is built; the distinction between civilians and combatants ensures respect for and the protection of civilian population.⁷⁰ The general prohibition of indiscriminate attacks supports the prohibition of indiscriminate weaponry. Weapons that are by nature indiscriminate are those that cannot be directed at a military objective or whose effects cannot be limited as required by international humanitarian law.⁷¹ The use of such weaponry is categorised as a war crime under the Rome Statute of the International Criminal Court.⁷² The nature of indiscriminate attacks is supported upon three major principles of international humanitarian law:

- i) The principle of distinction,
- ii) The principle of proportionality; and

⁶⁸ Article 51.

⁶⁹ Article 51(4), Additional Protocol I 1977.

⁷⁰ Article 48 Additional Protocol I 1977.

⁷¹ Rule 71, Weapons that are by Nature Indiscriminate, ICRC Database of Customary IHL.

⁷² Article 8(2)(b)(xx), Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) A/CONF 183/9.

iii) The principle of precaution to prevent unnecessary suffering.

These principles can therefore be applied in determining the status and possible prohibition of booby-traps and other devices in international law. Amended Protocol II of the Convention on Certain Conventional Weapons prohibits the use of booby traps and other devices in civilian areas without appropriate measures taken to protect civilians.⁷³ However, these restrictions are not in line with the current understanding of the nature of booby-traps and other devices in armed conflicts. Judge Higgins, in her dissenting opinion in the *Nuclear Weapons* case, found that a weapon is indiscriminate in nature if it is incapable of discriminating between civilian and military targets.⁷⁴ The UK Manual states that booby-traps cannot be used under any circumstances in an indiscriminate way and are only permissible where they are used in 'a reasonable prospect that only combatants will become victims of the booby-traps and that the risk to civilians does not outweigh the military advantage of laying booby-traps.'⁷⁵ In addition, it is prohibited to use booby-traps and other devices that cause 'superfluous injury or unnecessary suffering', refer to our arguments above on anti-personnel mines in this regard.⁷⁶

Booby-traps and other devices are increasingly being used in densely populated civilian areas due to the changing nature of warfare. A report released by *Medecins sans Frontieres* ('MSF') called for demining activities to be stepped up urgently due to booby-traps and IEDs being employed while people were fleeing or attempting to return

⁷³ Article 7(3), The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices as amended on May 1996 (Amended Protocol II).

⁷⁴ Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion), 1996 ICJ Rep 226 Dissenting Opinion of Judge Higgins, 366 at para.23. See also, Additional Protocol Article 51(4).

⁷⁵ The Joint Service Manual of the Law of Armed Conflict, UK Ministry of Defence (2004), para.6.7.

⁷⁶ Article 3(3), Amended Protocol II CCW. See UK Joint Service Manual of the Law of Armed Conflict, *ibid*, para.6.7.5.

home.⁷⁷ In Ayn Al Arab/Kobane and Tay Abyad, the report submits that 80% of victims of booby-traps and IEDs were civilians, including four children under the age of 15.⁷⁸ The vast majority of casualties of booby-traps and IEDs are civilians. In Syria, many booby-traps have been discovered in streets, houses, doorway or under objects likely to attract civilians such as televisions, teddy bears and fridges.⁷⁹ This creates real challenges for civilians attempting to return home after the cessation of hostilities, where many have been injured by booby-traps left behind by non-state armed groups.

The Amended Protocol II of the CCW stipulates that belligerents employing booby-traps and other devices must record the location, nature of quantity of booby-traps.⁸⁰ However, this is not easily translated into the rules and practice of non-state armed groups, who are fight an asymmetrical way and do not have access to more technologically advanced weapons or 'smart' anti-personnel mines or training on international humanitarian law. For those who do employ booby-traps or other devices, many of them will not record the exact position of such devices, making the clean-up operation particularly difficult. In Afghanistan, the prohibitions on booby-traps and other devices contained in Amended Protocol II were largely ignored in practice by the Taliban; US marines operating in 2010 in the Taliban stronghold of Marjah documented that five to six explosions were heard each hour, with most believed to be booby-trapped IEDs.⁸¹ Between 1st January to 30th June 2017, 337 civilians were killed and 591 injured by IEDs in Afghanistan.⁸²

⁷⁷ *Medecins sans Frontieres*, Set to Explode: Impact of Mines, Booby-traps and Explosive Remnants of War on Civilians in Northern Syria, (2017) <http://www.msf.org/sites/msf.org/files/msf-syria-settoexplode.pdf> accessed 14th November 2017.

⁷⁸ *Ibid.* p15.

⁷⁹ *Ibid.*, p9.

⁸⁰ Article 3(3) of Protocol on Explosive Remnants of War annexed to the CCW (Protocol V), 23 November 2003.

⁸¹ Ian Pannell, 'Nato-led forces battle gunmen and booby traps' (BBC News, 14th February 2010) http://news.bbc.co.uk/1/hi/world/south_asia/8514825.stm accessed 20 November 2017.

⁸² Afghanistan: Protection of Civilians in Armed Conflict, UNAMA Midyear Report 2017, July 2017, p36-39.

Indiscriminate weapons and attacks are those that also violate the principle of proportionality.⁸³ Proportionality is important in minimising the effects of attacks in causing civilian losses and injuries in wartime. The principles of proportionality and unnecessary suffering are equally applicable in the discussion concerning booby traps and other devices. Due to the deceiving nature of booby traps and improvised explosive devices (IEDs) attached to seemingly ordinary objects; including plastic and glass bottles. These non-detectable fragments are prohibited under Protocol I.⁸⁴ In Mosul in Iraq and Raqqa in Syria, booby-traps and IEDs were used to prevent civilians from leaving by Islamic State;⁸⁵ yet with the end of hostilities they continue to cause further deaths and injuries to civilians returning to their homes.⁸⁶

Combatants are not entirely protected from booby-traps or other devices, which indicates that such weapons *per se* are not deemed to contravene the principle of unnecessary suffering.⁸⁷ It is suggested this ignores a crucial element of booby-traps and other devices as indiscriminate weaponry. During the Vietnam War, the Viet Cong heavily employed booby-traps as part of their tactics.⁸⁸ One example includes the use of tiger traps; a tripwire would release a man-sized plank weighted down with bricks and containing metal spikes onto the unsuspecting person's forehead. According to the current provision surrounding booby-traps and other devices, this type of weaponry is

⁸³ Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, (2004), para.6.4.

⁸⁴ Protocol I to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (CCW).

⁸⁵ See Amnesty International, "I Won't Forget This Carnage" Civilians Trapped in Battle for Raqqa – Syria, MDE 24/6945/2017, 23 August 2017.

⁸⁶ Emma Graham-Harrison, The cunning and cruel bombs used by Isis to stall the Mosul offensive, *The Guardian*, 30 October 2016 <https://www.theguardian.com/world/2016/oct/29/isis-booby-trapped-toys-mosul>; and Jeff Seldin, Cleared of Islamic State, Raqqa Remains a Deadly Battlefield, *Voice of American*, 31 October 2017 <https://reliefweb.int/report/syrian-arab-republic/cleared-islamic-state-raqqa-remains-deadly-battlefield>

⁸⁷ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016), p81.

⁸⁸ Joan Henderson, War as a Tourist Attraction: the Case of Vietnam, [2000] 2(4) *The International Journal of Tourism Journalism* 269-280.

not prohibited. However, due to the nature of non-international armed conflicts and insurgencies it is easy to imagine the potential risk of a civilian stumbling upon such a trap or device.

Booby-traps have been cited in practice as being indiscriminate in certain or all contexts.⁸⁹ It is suggested that the use of booby-traps and other devices cannot satisfy the principles of distinction, proportionality and precaution to minimise unnecessary suffering due to their nature and use within armed conflict, particularly concerning non-state armed groups.

II. Booby-traps and other devices as perfidious weaponry

Booby traps and other devices are prohibited under the CCW for their potential perfidious use. Perfidy is also prohibited under Additional Protocol I 1977:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) The feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) The feigning of an incapacitation by wounds or sickness;
- (c) The feigning of civilian, non-combatant status; and
- (d) The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.⁹⁰

The definition of booby-traps or other devices are inherently perfidious in their nature. Where it is prohibited to 'invite confidence' with the 'intent to betray' that confidence, the purpose of booby-traps is to attach them to 'apparently harmless object' to kill or injure unexpectedly. Other devices can be similarly used and attract the same

⁸⁹ See UN Secretariat, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, (1973) [153] p186.

⁹⁰ Article 37(1), Additional Protocol I 1977.

prohibition.⁹¹ This contrast creates a lack of clarity in legal rules on when they will not be perfidious since Article 7(1) of Amended Protocol II only states what objects booby-traps are not to be attached to. This distinction is necessary to ensure combatants are aware of their obligations to protect civilians and organisations from harm. Thus the list in Article 7 is not exhaustive, as for example it does not prevent perfidious targeting of combatants, which would be in violation of IHL.⁹²

Article 7(2) CCW prohibits the use of booby-traps or other devices in the form of ‘apparently harmless portable objects which are specifically designed and constructed to contain explosive material’. This includes prohibiting the attachment of a booby trap to harmless objects including ‘internationally recognized protective emblems, signs or signals’, food or drink, children’s toys or other objects relating to the ‘feeding, health, hygiene, clothing or education of children’.⁹³

Amended Protocol II CCW is silent on whether violating the Protocol will constitute an act of perfidy; however, Article 7 outline a number of prohibited acts in using booby traps and other devices that would like amount to perfidy.⁹⁴ The ICRC Commentary states that any violation of the restrictions will amount to perfidy.⁹⁵ Neither sources acknowledge a broader view that other objects civilians may find harmless can be used because they are not included in Article 7(1), but by definition

⁹¹ Article 7, APII CCW.

⁹² Kevin Heller, *Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War*, (2015) 91 *International Law Studies*, US Naval War College 517.

⁹³ Article 7(1) AP II CCW 1996.

⁹⁴ Under Article 7(1) provides a specified list of employing booby-traps or other devices that are ‘attached to or associated with: (a) internationally recognized protective emblems, signs or signals; (b) sick, wounded or dead persons; (c) burial or cremation sites or graves; (d) medical facilities, medical equipment, medical supplies or medical transportation; (e) children’s toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children; (f) food or drink; (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots; (h) objects clearly of a religious nature; (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or (j) animals or their carcasses.’ Article 7(2) also prohibits using ‘booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material.’

⁹⁵ Rule 65, Perfidy, ICRC Customary IHL Database.

their use would make the act perfidious. For example, attaching an explosive device to a civilian car that will kill or injure when the engine is turned on is not prohibited. As such, it is not enough for a booby-trap or other device to comply with the list set out in Article 7(1) of APII to be the definitional parameters for a war crime.

A clear distinction must be established to distinguish anti-personnel mines, booby-traps and other devices used perfidiously. The lack of commentary on booby-traps and other devices highlights the growing need for a definition that states what objects they can be attached to; how they should be recorded and monitored to minimise the impact on civilians as the ‘coherent account of law-of-war perfidy remains elusive’.⁹⁶

III. Draft article on booby-traps or other devices as a war crime

Article 8, paragraph 2(b) (xxix)

(..) 2. For the purpose of this Statute, "war crimes" means:

(..) b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(xxix) Employing booby-traps⁹⁷ or other devices⁹⁸ in an indiscriminate⁹⁹ or treacherous¹⁰⁰ manner.

⁹⁶ Sean Watts, Law-of-War Perfidy, (2014) 219 *Military Law Review* 106, para.1500.

⁹⁷ As per Article 1(4), APII CCW to include ‘any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.’

⁹⁸ Article 1(5), APII CCW, including ‘manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.’

⁹⁹ As per Article 51(4), AP I.

¹⁰⁰ We followed the language in Article 8(2)(b)(xi) and 8(2)(e)(ix) to only include killing or wounding treacherously, as perfidy under international humanitarian law also includes capture, which is beyond the scope of international criminal law.

Elements of the crime

The above hypothetical amendment to the Rome Statute may require proof through the following elements:

- 1) the conduct took place in the context of and was associated with an international armed conflict**

This element was identified as common to all crimes under section 8(2)(b) of the Rome Statute.¹⁰¹

- 2) The perpetrator was aware of the factual circumstances that established the existence of an armed conflict**

This element was also identified as common to all crimes under section 8(2)(b) of the Rome Statute.¹⁰²

- 3) The perpetrator employed a booby-trap or other device or ordered a person which the perpetrator had de jure or de facto command over to use a booby-trap.**

The conduct element of the crime requires the perpetrator to have some link to the use of an booby-trap or other device.

- 4) That the booby-trap or other device was primarily designed to be employed in an indiscriminate or treacherous way.**

The circumstantial element of the crime requires that a booby-trap or other device was used under the definition of such a device under Amended Protocol II CCW. This element will close liability for this crime to those who believe that they are legitimately using or ordering the use of booby-trap or other device against combatants and not in a

¹⁰¹ Dörmann n.1, p377-378.

¹⁰² *Ibid.*

perfidious way. This circumstantial element narrows liability for the proposed amendment.

5) The perpetrator:

(a) intended to employ a booby-trap or other device;

The most basic fault element would involve intent to employ the booby-trap or other device. The perpetrator must intend to employ the booby-trap or other device. Liability would be fixed on those who intended to use it, and did in fact use it.

(b) intended to order a person to use a booby-trap or other device;

This mental element would extend liability to military commanders or superiors who order a subordinate, who they had de jure or de facto command.

(c) was reckless or wilfully blind as to whether a person under their orders employed a booby-trap or other device;

This mental element would extend liability beyond direct intent. It would open liability for military commanders or superiors who should have known that their subordinates were using such devices, although these commanders or superiors did not directly order their use. Military superiors or commanders who fail to stop their subordinates from setting a booby-trap or other device can have intent imputed to them.¹⁰³

6) The perpetrator knew or was wilfully blind to the fact that the used booby-trap or other devices were primarily designed to used indiscriminately or treacherously.

This element requires knowledge or imputed knowledge that the perpetrator knew that booby-trap or other devices were used and that their effect was indiscriminate or treacherous. This would include the elements outlined in the Amended Protocol II CCW on perfidious use against civilians and protected persons and objects, as well as treacherous use against combatants outlined above.

¹⁰³ *Ibid.*, p381-382.

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